Michigan Law Review

Volume 65 | Issue 6

1967

The Elementary and Secondary Education Act the Implications of the Trust-Fund Theory for the Church-State Questions Raised by Title I

Jon Feikens
University of Michigan Law School

COMMENTS

The Elementary and Secondary Education Act— The Implications of the Trust-Fund Theory for the Church-State Questions Raised by Title I

The issues raised by the granting of federal aid both to education in general and to non-public education in particular have caused considerable controversy in recent years.[1] Although several federal statutes dealing with various aspects of both types of aid had been enacted previously,[2] the early 1960's saw an increased desire on the part of Congress to enter this area with a comprehensive plan.[3] Finally, in 1965, the question of aid to education in general was resolved in favor of carrying the war on poverty to the elementary and secondary schools.[4] Simultaneously, a so-called "church-state settlement" was reached whereby it was decided that some form of benefit should also be extended to non-public education.[5] Provisions reflecting both decisions were incorporated into and formed the basis of the Elementary and Secondary Education Act of 1965 (ESEA).[6]

1. Bibliographies on the subjects of church-state relations and aid to religious education can be found in every issue of the JOURNAL OF CHURCH AND STATE (published by the J. M. Dawson Studies in Church and State of Baylor University) and RELIGION AND THE PUBLIC ORDER (published by the Institute of Church and State of Villanova University School of Law). For other bibliographies see KAUPER, RELIGION AND THE CONSTITUTION 131-34 (1964); MCGARRY & WARD, EDUCATIONAL FREEDOM AND THE CASE FOR GOVERNMENT AID TO STUDENTS IN INDEPENDENT SCHOOLS 209-21 (1966); Education Subcomm. of Senate Comm. on Labor and Public Welfare, *Constitutionality of Federal Aid to Education in its Various Aspects*, S. DOC. No. 29, 87th Cong., 1st Sess. 28-30 (1961).

2. For a collection of these statutes see Education Subcomm. of Senate Comm. on Labor and Public Welfare, *op. cit. supra* note 1, at 37-48; Rafalko, *The Federal Aid to Private School Controversy: A Look*, 3 DUQUESNE U.L. REV. 211, 219 (1965).

3. See Kelley & Lanoue, *The Church-State Settlement in the Federal Aid to Education Act*, in 1965 RELIGION AND THE PUBLIC ORDER 110, 112 (1966). For a background of the political development of the federal aid to education question, see BENDINER, OBSTACLE COURSE ON CAPITOL HILL (1964); MUNGER & FENNO, NATIONAL POLITICS AND FEDERAL AID TO EDUCATION (1962). See generally Education Subcomm. of Senate Comm. on Labor and Public Welfare, *op. cit. supra* note 1.

4. The Elementary and Secondary Education Act is intended to be one of the main tools of the poverty program. See S. REP. No. 146, 89th Cong., 1st Sess. 3-4 (1965), for the President's message on the purpose of the Act; NATIONAL ADVISORY COUNCIL ON THE EDUCATION OF DISADVANTAGED CHILDREN, FIRST ANNUAL REPORT (1966), reproduced in H.R. REP. No. 1814 (pt. 2), 89th Cong., 2d Sess. 11-23 (1966) [Page citations are hereinafter made to this reproduction].

5. Kelley & Lanoue, *supra* note 3. The authors contend that the hearings on the Elementary and Secondary Education Act produced, or were indicative of, a church-state settlement among the various interest groups having a stake in federal aid to education.

6. 79 Stat. 27 (1965), as amended, 20 U.S.C. §§ 236-44, 331-36, 821-27, 841-48, 861-70, 881-85 (Supp. 1965), as amended, 20 U.S.C.A. §§ 238, 240-44, 331a-32b, 821-23, 841-44, 861-64, 867, 871-76 (Supp. 1967) [hereinafter referred to as ESEA]. For the legislative history of the ESEA and its amendments, see S. REP. No. 146, 89th Cong., 1st Sess.

To accomplish its primary goal of aiding all educationally deprived children with maximum flexibility,[7] the ESEA includes five programs: auxiliary or special educational benefits in the form of services or equipment;[8] textbook grants and loans;[9] special educational centers;[10] grants to universities to advance educational research;[11] and grants to strengthen state departments of education.[12]

The most significant of the five programs, as measured by the number of projects implemented and the amount of funds expended, is the special educational services program authorized by Title I.[13] The administration of this program is highly decentralized, with responsibility distributed among the Office of Education of the Department of Health, Education and Welfare, the state educational agencies, and the local educational agencies. While federal control of any aspect of education is expressly prohibited,[14] the Office of Education still performs three essential functions: developing guidelines for the administration of Title I; approving applications sub-

(1965) (ESEA of 1965); H.R. REP. No. 143, 89th Cong., 1st Sess. (1965) (ESEA of 1965); H.R. REP No. 1814, 89th Cong., 2d Sess. (1966) (1966 amendments); *Hearings on S. 370 Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 89th Cong., 1st Sess. (1965) (ESEA of 1965); *Hearings on Aid to Elementary and Secondary Education Before the General Subcomm. on Education of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. (1965) (ESEA of 1965).

7. E.S.E.A. § 201, 79 Stat. 27 (1965), 20 U.S.C. § 241a (Supp. 1965) (declaration of congressional purpose); H.R. REP. No. 1814 (pt. 2), 89th Cong., 2d Sess. 12 (1966); Note, *Church-State—Religious Institutions and Values: A Legal Survey—1964-66*, 41 NOTRE DAME LAW. 681, 715 (1966). The benefits of the ESEA are not, however, necessarily *restricted* to educationally deprived children. For example, the benefits of Titles II and V are accorded to all children.

8. The auxiliary services and equipment program is dealt with in Title I of the ESEA, 79 Stat. 27 (1965), as amended, 20 U.S.C. §§ 241a-44 (Supp. 1965), as amended, 20 U.S.C.A. §§ 241a-44 (Supp. 1967). Title I amends Public Law 81-874, 64 Stat. 1100 (1950), as amended, 20 U.S.C. §§ 236-44 (1964), which provides financial assistance for areas affected by federal activities.

9. 79 Stat. 36 (1965), 20 U.S.C. §§ 821-27 (Supp. 1965), as amended, 20 U.S.C.A. §§ 821-23 (Supp. 1967) (Title II).

10. 79 Stat. 39 (1965), 20 U.S.C. §§ 841-48 (Supp. 1965), as amended, 20 U.S.C.A. §§ 841-44 (Supp. 1967) (Title III).

11. 79 Stat. 44 (1965), 20 U.S.C. §§ 331-32b (Supp. 1965), as amended, 20 U.S.C.A. §§ 331a-32b (Supp. 1967) (Title IV).

12. 79 Stat. 47 (1965), 20 U.S.C. §§ 861-70 (Supp. 1965), as amended, 20 U.S.C.A. §§ 861-64, 867 (Supp. 1967), is Title V of the ESEA. A sixth title was added to the ESEA in November 1966, providing funds for the education of handicapped children in public and non-public schools. 80 Stat. 1204 (1966), 20 U.S.C.A. §§ 881-85 (Supp. 1967).

13. See NATIONAL ADVISORY COUNCIL ON THE EDUCATION OF DISADVANTAGED CHILDREN, *op. cit. supra* note 4, at 11-12; U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, A CHANCE FOR A CHANGE 52-56 (1965).

14. E.S.E.A. § 604, 79 Stat. 57 (1965), 20 U.S.C. § 884 (Supp. 1965):

> Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration or personnel of any educational institution or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system.

mitted by state educational agencies for participation in Title I benefits; and determining the maximum amounts to be allocated to eligible local educational agencies.[15] The state agency performs the pivotal administrative functions of submitting an application to the Office of Education, giving assurances that the state program will be implemented according to the tenor of the ESEA, and reviewing the project applications of the local educational boards, insisting upon their compliance with its prior assurances.[16] The local educational agency, in turn, has the primary responsibility for deciding which geographical areas are in need of Title I funds and which types of project will best meet the needs of the educationally deprived children of that area.[17]

The state agency will generally approve the local agency's project application if two major conditions are satisfied.[18] First, the type and scope of the plan must be such that the plan can reasonably be expected to meet the needs of the intended beneficiaries.[19] As to these determinations, the ESEA affords the local agency considerable leeway and discretion; not only are several widely varying project types suggested as available alternatives,[20] but local agencies are affirmatively encouraged to improvise and create programs which are

15. E.S.E.A. §§ 241b-d, g-h, 79 Stat. 27 (1965), 20 U.S.C. § 241b (Supp. 1965), as amended, 20 U.S.C.A. § 241b (Supp. 1967); 79 Stat. 28 (1965), as amended, 20 U.S.C. § 241c (Supp. 1965), as amended, 20 U.S.C.A. § 241c (Supp. 1967); 79 Stat. 30 (1965), repealed, 80 Stat. 1195, U.S.C.A. § 241d (Supp. 1967); 79 Stat. 32 (1965), as amended, 20 U.S.C. § 241g (Supp. 1965), as amended, 20 U.S.C.A. § 241g (Supp. 1967); 79 Stat. 33 (1965), 20 U.S.C. § 241h (Supp. 1965), as amended, 20 U.S.C.A. § 241h (Supp. 1967); see U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, GUIDELINES: SPECIAL PROGRAMS FOR EDUCATIONALLY DEPRIVED CHILDREN 1 (1965).

16. E.S.E.A. §§ 205-06, 79 Stat. 30 (1965), 20 U.S.C. § 241e (Supp. 1965), as amended, 20 U.S.C.A. § 241e (Supp. 1967); 79 Stat. 31 (1965), as amended, 20 U.S.C. § 241f (Supp. 1965), as amended, 20 U.S.C.A. § 241f (Supp. 1967); see U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, *op. cit. supra* note 15, at 1-2.

17. E.S.E.A. § 241e, 79 Stat. 30 (1965), 20 U.S.C. § 241e (Supp. 1965), as amended, 20 U.S.C.A. § 241e (Supp. 1967). Many states have drawn up guidelines to aid the local educational agencies in applying for Title I projects. See, *e.g.*, HAWAII DEP'T OF EDUCATION, TITLE I, P.L. 89-10 GUIDELINES (1966); NEW MEXICO DEP'T OF EDUCATION, GUIDELINES: TITLE I, E.S.E.A. SERVICES (1966); PENNSYLVANIA DEP'T OF PUBLIC INSTRUCTION, PROCEDURES FOR IMPLEMENTING THE ELEMENTARY AND SECONDARY EDUCATION ACT, TITLE 1 (1966).

18. In addition to the two enumerated conditions, several other requirements are imposed by E.S.E.A. § 205, 79 Stat. 30 (1965), 20 U.S.C. § 241e (Supp. 1965), as amended, 20 U.S.C.A. § 241e (Supp. 1967). The local agency must prove to the state agency's satisfaction that control of the program will be in a public agency, that any construction project fulfills certain uniform requirements, that effective evaluation measures will be adopted, that the local agency will report annually to the state agency, that the program will be carried on in cooperation with an existing community action program, and that educational research information derived from the program will be published.

19. E.S.E.A. § 205(a)(1), 79 Stat. 30 (1965), 20 U.S.C. § 241e(a)(1) (Supp. 1965), as amended, 20 U.S.C.A. § 241e(a)(1) (Supp. 1967).

20. S. REP. No. 146, 89th Cong., 1st Sess. 10-11 (1965); see Sky, *The Establishment Clause, the Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1449-52 (1966).

responsive to the peculiar needs of the educationally deprived children of a particular project area.[21] Although available statistics are far from complete,[22] it appears that the bulk of Title I projects involve some type of non-instructional service,[23] such as remedial reading or speech therapy.[24] The similarity of the projects actually implemented, especially when viewed in light of the discretion afforded local officials, seems to indicate a belief on the part of educators that the solution to the problems of educational deprivation lies in "compensatory" educational services, which services offer the student special instruction in a skill or subject, thereby enabling him to proceed at the same rate as his peers.[25]

The second condition which a local board's project application must satisfy in order to obtain state approval is that deprived children in non-public schools in the district must be included among the recipients of Title I benefits.[26] This requirement raises two problems. First, since the ESEA apparently requires that the compensatory or remedial instruction provided under Title I be given by public school personnel,[27] the local board must determine which of two available methods should be used to reach the non-public school pupils. Under the shared time method, the non-public pupil would leave his school either during or after school hours and go to the public school where he would receive the instruction.[28] On the other hand, under the shared services method, the pupil

21. S. REP. No. 146, 89th Cong., 1st Sess. 10 (1965).

22. The Department of Health, Education, and Welfare has recently given a grant to Boston University to make a complete study of the implementation of the ESEA in the various states. HEW itself is presently compiling statistics on the implementation of Title I, which will form the basis of Boston University's study. These statistics will reflect such items as the number of children involved, number of projects, type of projects, amounts spent. The only statistics which are presently available can be found in H.R. REP. No. 1814 (pt. 2), 89th Cong., 2d Sess. 24-27 (1966); U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, *op. cit. supra* note 13, at 52-56.

23. Non-instructional services are services designed to meet the special educational needs of educationally deprived children. See OP. IOWA ATT'Y GEN., April 14, 1966, p. 6.

24. A study of 500 selected Title I projects implemented in 1965 shows that 59% involved language arts or remedial reading. See U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, *op. cit. supra* note 13, at 54; NATIONAL ADVISORY COUNCIL ON THE EDUCATION OF DISADVANTAGED CHILDREN, *op. cit. supra* note 4, at 15; Sky, *supra* note 20, at 1450.

25. See NATIONAL ADVISORY COUNCIL ON THE EDUCATION OF DISADVANTAGED CHILDREN, *op. cit. supra* note 4, at 14. For a definition of "compensatory education," see generally SMITH, KROUSE & ATKINSON, THE EDUCATOR'S ENCYCLOPEDIA 868 (1961).

26. E.S.E.A. § 205(a)(2), 79 Stat. 30 (1965), 20 U.S.C. § 241e(a)(2) (Supp. 1965).

27. Since it is doubtful that the salaries of non-public school teachers could constitutionally be paid from federal funds, public school teachers are the only ones who would qualify. See Note, *The Elementary and Secondary Education Act of 1965 and the First Amendment*, 41 IND. L.J. 302, 315 (1966).

28. Shared time or dual enrollment is specifically authorized by E.S.E.A. § 205(a)(2), 79 Stat. 30 (1965), 20 U.S.C. § 241e(a)(2) (Supp. 1965). The regulations promulgated pursuant to the ESEA also specify shared time as a possible means of carrying out a Title I project for the benefit of non-public schoolchildren. 45 C.F.R. § 116.19(c) (Supp. 1966).

remains at the non-public school and is instructed by an in-coming teacher.[29] Once the means of implementing the aid project have been selected, the second and more difficult problem must be resolved—whether either the shared time or shared services program is constitutional when it involves children attending church-related schools. One argument is that Title I programs violate the "establishment of religion" or the "free exercise" clauses of the first amendment to the United States Constitution.[30] As it relates to shared time, this issue is treated subsequently in this issue[31] and will not be dealt with directly in this Comment. A second argument is that since, with some exceptions,[32] state constitutional provisions dealing with aid to non-public schools are more restrictive than those of the first amendment,[33] such programs may violate state constitutional provisions.[34] It is therefore the purpose of this Comment to examine

29. Shared services projects also appear to be specifically authorized by E.S.E.A. § 205(a)(2), 79 Stat. 30 (1965), 20 U.S.C. § 241e(a)(2) (Supp. 1965). The regulations purport to limit the use of shared services to those projects that deal only with special educational services which the non-public school does not otherwise offer. See 45 C.F.R. § 116.19(d) (Supp. 1966).

30. To date Title I has been challenged in three suits on first amendment grounds: Smith v. School Dist., Civil No. 3797 (C.P. Phila. County, Pa., filed Nov. 14, 1966); Flast v. Gardner, Civil No. 4102/1966 (S.D.N.Y., filed Dec. 1, 1966); and Polier v. Board of Educ., Civil No. 19540/1966 (Sup. Ct. N.Y. County, filed Dec. 1, 1966). A suit contesting the validity of Title II under the first amendment is also pending. Protestants and Other Americans United for the Separation of Church and State v. United States, Civil No. 3303 (S.D. Ohio, motion to dismiss filed Aug. 16, 1966). In O'Hare v. Board of Educ., Civil No. 27899 (E.D. Mich., filed Jan. 17, 1966), a suit challenging Michigan's Auxiliary Services Act, MICH. COMP. LAWS § 340.622 (Supp. 1966), the court granted a motion to abstain. The court will retain jurisdiction of the case, holding the first amendment challenge in abeyance until the state courts have interpreted the act under state law. Because of the similarity between the provisions of the Michigan Act and Title I, it has been suggested that a determination of the constitutionality of the former will bear heavily on the latter. See Church and State, March 1966, p. 6.

For a discussion of the constitutional validity of the ESEA, see Sky, *supra* note 20, at 1441-62; Note, *The Elementary and Secondary Education Act of 1965 and the First Amendment*, 41 IND. L.J. 302 (1965). See generally Carey, *The Child Benefits System in Operation—Federal Style*, 12 CATHOLIC LAW. 185 (1966); Taylor, *Federal Aid for Children and Teachers in All Schools*, 12 CATHOLIC LAW. 193 (1966). The New Jersey Attorney General has expressed the opinion that the ESEA is valid under the first amendment. OP. N.J. ATT'Y GEN. No. 4 (1965).

31. See Note, 65 MICH. L. REV. 1224 (1967).

32. *E.g.*, ORE. CONST. art. 1, §§ 2-3. These provisions have been held to be identical to the provisions of the United States Constitution. City of Portland v. Thornton, 174 Ore. 508, 149 P.2d 972, *cert. denied*, 323 U.S. 770 (1944). Iowa's Constitution reads similarly to the Federal Constitution. IOWA CONST. art. I, § 3.

33. See Note, *The Elementary and Secondary Education Act of 1965 and the First Amendment*, 41 IND. L.J. 302, 306 (1966). For a brief study of some of the factors which led to the restrictive attitude of the states, see MCLAUGHLIN, A HISTORY OF STATE LEGISLATION AFFECTING PRIVATE ELEMENTARY AND SECONDARY SCHOOLS IN THE UNITED STATES, 1870-1945 (1946). See generally State *ex rel.* Weiss v. District Bd., 76 Wis. 177, 197-98, 44 N.W. 967, 974-75 (1890).

34. The legislative history of the ESEA indicates that Congress was concerned with the problem of state law and its effect on the implementation of the Act. See *Hearings on S. 370 Before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare*, 89th Cong., 1st Sess. 183-477 (1965). The bulk of this material

the applicability of state law to Title I programs and to consider the possible effects which a finding of invalidity may entail.

I. The Theoretical Framework

The problem of determining the relevance of state substantive law to the implementation of Title I is a difficult one because of the lack of relevant precedent. Many, if not the majority of, state agencies seem to have ignored the problem and are currently proceeding in general conformity with the federal guidelines.[35] Nevertheless, it should be noted that this lack of guidance may be one of the causes of the apparent confusion existing at the state level with respect to the amount of participation of non-public schoolchildren which is required in order to conform with the provisions of Title I. Moreover, this confusion was recognized as one of the principal reasons for the setbacks during the first year of Title I's operation.[36] However, many state departments of education have requested their attorneys general to consider the relevance of their state law to the establishment of a Title I program. Since the authorization for these programs is found in a federal statute, it might appear at first blush that the effect, if any, of state law on these programs would be rendered nugatory by operation of the supremacy clause of the federal constitution.[37] However, if some aspect of the Title I program is not completely controlled by the federal law and is a proper object of state concern, state law would be applicable despite the supremacy clause. Two such aspects of the programs have been suggested: (1) the funds themselves which have been transmitted by the Office of Education to the state agency; and (2) the state officials who are involved in the administration of the particular program.

A. *Title I Funds as an Object of State Constitutional Concern: The Trust-Fund Theory*

One of the problems which received considerable attention during the hearings on the ESEA was the allocation of control over

is a study of various state constitutional provisions relevant to the church-state issue. There are also several books which deal with the effect of state constitutional law on religious freedom and aid to sectarian institutions. See generally Antieau, Carroll & Burke, Religion Under the State Constitutions (1965); Katz, Religion and American Constitutions (1964); McLaughlin, *op. cit. supra* note 33.

35. A survey of all 50 state departments of education showed that, of the 43 that responded, only thirteen had solicited opinions on the legality of implementing the ESEA under state law—Arizona, Georgia, Iowa, Kentucky, Nebraska, Nevada, New Jersey, New York, Oklahoma, Oregon, South Dakota, West Virginia and Wisconsin.

36. One setback occasioned by this confusion was the inadequate degree of participation by non-public schoolchildren in Title I projects. See National Advisory Council on the Education of Disadvantaged Children, *op. cit. supra* note 4, at 19, 22.

37. U.S. Const. art. VI, § 2.

Title I programs among federal, state, and private agencies,[38] although it is unlikely that private agencies were ever seriously considered as a proper repository of significant power.[39] The outcome of the debates was a series of provisions, the most important of which is section 203(a), stating that a local project will be approved only if

> the local educational agency has provided satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter; and that a public agency will administer such funds and property.[40]

The few cases which have dealt with the status of federal grants to states in aid of education have generally held that a trust arises which forces the state to comply with the stated purposes of the grant in distributing the assets.[41] In addition, several administrative rulings, particularly those of the Comptroller-General of the United States, suggest that a state as the grantee of federal funds must adhere to the conditions and purposes specified in the grant.[42] Furthermore,

38. See, *e.g.*, 111 CONG. REC. 5727-72 (1965).

39. However, some states have included non-public school authorities in planning Title I projects for the district. See Letter From Henry H. Parker, Director of the Kansas Department of Public Instruction, to the *Michigan Law Review*, Nov. 9, 1966; Letter From Ralph G. Hay, Administrative Coordinator of the Montana Department of Public Instruction, to the *Michigan Law Review*, Sept. 30, 1966; Letter From Leon R. Graham, Assistant Commissioner for Administration of the Texas Education Agency, to the *Michigan Law Review*, Sept. 23, 1966.

40. E.S.E.A. § 205(a)(3), 79 Stat. 30 (1965), 20 U.S.C. § 241e(a)(3) (Supp. 1965). In addition, the following sections also bear on the control question: § 206, 79 Stat. 31 (1965), as amended, 20 U.S.C. § 241f (Supp. 1965), as amended, 20 U.S.C.A. § 241f (Supp. 1967) (providing review by the Office of Education of assurances submitted by state agencies); § 207, 79 Stat. 32 (1965), as amended, 20 U.S.C. § 241g (Supp. 1965), as amended, 20 U.S.C.A. § 241g (Supp. 1967) (regulating disposition of funds by the state agency); § 210, 79 Stat. 33 (1965), 20 U.S.C. § 241j (Supp. 1965), as amended, 20 U.S.C.A. § 241j (Supp. 1967) (listing sanctions which can be imposed for non-compliance with assurances); § 604, 79 Stat. 57 (1965), 20 U.S.C. § 884 (Supp. 1965), as amended, 20 U.S.C.A. § 884 (Supp. 1967) (prohibiting federal control of any aspect of education).

41. See, *e.g.*, Montana State Federation of Labor v. School Dist., 7 F. Supp. 82 (D. Mont. 1934) (federal grant to local school district under N.R.A. must be used to promote the purposes of the statute); State *ex rel.* Black v. Board of Educ., 33 Idaho 415, 196 Pac. 201 (1921) (proceeds of land grants from federal government are trust funds and, therefore, not subject to state constitutional provision that money paid from state treasury first be appropriated by state legislature); Indiana v. Springfield Twp., 6 Ind. 83 (1854) (congressional land grant constitutes a trust and must be used for the purposes specified in the grant, citing several supporting cases); State *ex rel.* Spencer Lens Co. v. Searle, 77 Neb. 155, 109 N.W. 770 (1906) (same); Ross v. Trustees of Univ. of Wyoming, 31 Wyo. 464, 228 Pac. 642 (1924) (federal grant for university purpose said to be a trust fund, the court stating: "Upon the state's acceptance of the grant, it was placed in the position of a trustee; it holds the lands for the purposes expressed in the grant, and no other, and is under at least a moral obligation to conform to the terms and conditions contained in the granting act." *Id.* at 489-90, 228 Pac. at 651). *But see* State v. Clausen, 160 Wash. 618, 295 Pac. 751 (1931) (federal funds subject to state constitutional provision requiring legislative appropriation of state funds).

42. In a series of opinions, the Comptroller-General has consistently stated that

although the legislative history is somewhat unclear,[43] several provisions of the ESEA suggest that the drafters intended to create a trust, with the funds constituting the "res" and the state agency as the trustee. First, section 203(a) quoted above is phrased in classic trust terms—the legal title and administrative control is in the state "for the uses and purposes" which are subsequently described in the remainder of the section. Second, as in the creation of a trust, the Office of Education, pursuant to Title I, requires assurances from the state agency that its programs will be constructed and implemented so as to effectuate the specified purposes of section 205.[44] Finally, Title I contemplates certain procedures which closely resemble a standard trust administration scheme. For example, the applicant state must assure the Office of Education "that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure the proper disbursement of, and accounting for, Federal funds paid to the State . . . ."[45] The actual method of accounting suggested in the federal guidelines closely resembles the type of accounting used in most trusts.[46] In addition, the Office of Education retains some control over the implemented projects by means of an extensive

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federal grant-in-aid payments made to the state cease to be federal and become state funds. See, *e.g.*, 25 DECS. COMP. GEN. 868 (1946) (funds granted for agricultural college extension work); 16 DECS. COMP. GEN. 948 (1937) (social security funds); 14 DECS. COMP. GEN. 916 (1935) (funds granted to state under authority of Emergency Relief Appropriation Act of 1935, 49 Stat. 115). Nevertheless, as a corollary, it also seems settled that if a particular grant is made upon some condition, the state law which would otherwise be applicable must give way to the paramount federal interest. In addition to the above decisions, see 2 DECS. COMP. GEN. 684 (1923) (federal funds paid to a state under the Vocational Education Act are held in custody by the state for the specific purposes provided for by the act). The General Accounting Office has not as yet rendered an opinion on the ESEA. See Letter From J. H. Coffey, Assistant General Counsel of the G.A.O., to the *Michigan Law Review*, Jan. 17, 1967. See generally HAMILTON, SELECTED LEGAL PROBLEMS IN PROVIDING FEDERAL AID FOR EDUCATION 10-11 (1938), a study prepared for the Advisory Committee on Education appointed by President Roosevelt in 1936 for the purpose of studying the subject of federal relationships with state and local government.

43. *Compare* S. REP. No. 146, 89th Cong., 1st Sess. 7-9 (1965) (suggesting a number of ESEA requirements which appear to impose a trust), *with* 111 CONG. REC. 7309 (1965) (remarks of Senator Morse indicating that Title I funds would be commingled with state funds and would therefore apparently lose their trust impression). See also 45 C.F.R. § 116.20 (Supp. 1966).

44. E.S.E.A. § 205, 79 Stat. 30 (1965), 20 U.S.C. § 241e (Supp. 1965), as amended, 20 U.S.C.A. § 241e (Supp. 1967).

45. E.S.E.A. § 206(a)(2), 79 Stat. 31 (1965), as amended, 20 U.S.C. § 241f(a)(2) (Supp. 1965), as amended, 20 U.S.C.A. § 241f (Supp. 1967).

46. See U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, *op. cit. supra* note 15, at 5-12, for the requirement of fiscal administration. The accounting system to be used for Title I funds has been considered a significant element in determining whether federal funds are impressed with a trust. OP. IOWA ATT'Y GEN., April 14, 1966 (the obligation method of accounting which the state must use indicates the trust impression of Title I funds). See generally U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, FINANCIAL MANAGEMENT OF FEDERAL-STATE EDUCATION PROGRAMS 2, 3, 5 (1962), for the requirement of separate identification funds for each separate federal education program.

evaluation program, which includes a periodic audit analogous to a fiduciary accounting.[47]

The importance of the trust-fund theory lies in its effect on the applicability of state law to the "res" of the trust. If the ESEA has created a true trust, it would appear that state law could not be invoked as a criterion by which to measure the legality of Title I expenditures; since the funds are granted only upon receipt of an assurance that they will be spent in accordance with the purposes of the federal statute, only federal law is applicable.[48] Therefore, assuming that a program envisioned by the drafters of the ESEA does not violate the federal constitution, a state constitutional provision could not, pursuant to the trust-fund theory, be used to defeat that program. It must, however, be noted that the trust-fund theory can be invoked to render state law irrelevant only with respect to the possible uses of the corpus of the trust and, as will be discussed below, the theory is not applicable with respect to the actions of state officials.[49]

Several states have seized upon the trust-fund theory in order to insure that local educational agencies will include parochial and other non-public schoolchildren among the recipients of the benefits of Title I projects, pursuant to section 205(a)(2). These states can be divided into two groups on the basis of their existing framework of laws. The first group comprises those states which have passed some type of statute enabling the state educational agency to apply for, receive, and distribute Title I funds according to the guidelines established by the ESEA and its regulations.[50] Since the enabling

47. E.S.E.A. § 206, 79 Stat. 31 (1965), as amended, 20 U.S.C. § 241f(a)(2) (Supp. 1965), as amended, 20 U.S.C.A. § 241f (Supp. 1967), subjects the state's Title I program to an evaluation by the Office of Education. If the Commissioner determines that the assurances given pursuant to § 205, 79 Stat. 30 (1965), 20 U.S.C. § 241e (Supp. 1965), as amended, 20 U.S.C.A. § 241e (Supp. 1967), are not being met, he may withhold further payment of funds. E.S.E.A. § 210, 79 Stat. 33 (1965), 20 U.S.C.A. § 241j (Supp. 1967). If the state agency wishes to contest the Commissioner's determination, it may bring a suit in the court of appeals for a review of his action. E.S.E.A. § 211, 79 Stat. 33 (1965), 20 U.S.C. § 241k (Supp. 1965), as amended, 20 U.S.C.A. § 241k (Supp. 1967).

48. HAMILTON, *op. cit. supra* note 42, at 1-2. See also State *ex rel.* Black v. Board of Educ., 33 Idaho 415, 196 Pac. 201 (1921). See generally Quick Bear v. Leupp, 210 U.S. 50 (1908), which involved the constitutionality under the first amendment of an American Indian appropriation act forbidding contracts for the education of Indians in sectarian schools. The Court held that the first amendment and the statute applied only to money collected by taxation of the general public and not to tribal and trust funds belonging to the Indians. The case was also partially based on the proposition that to deny the possibility of sectarian education to Indian children would violate their right of free exercise under the first amendment. *Id.* at 81-82.

49. See text accompanying notes 60-78 *infra*.

50. See, *e.g.*, KY. REV. STAT. § 156.100 (Supp. 1962); N.C. GEN. STAT. § 115-35(g) (Supp. 1965); ORE. REV. STAT. § 326.051(2)(b) (1965); W. VA. CODE § 18-10-8 (1966). The Ohio enabling act, which has been regarded as a model in its liberality, provides:

> The state board of education or any other board of education may provide for any resident of a district any educational service for which funds are made available to such boards of education by the United States under the authority of public

act in such states explicitly permits that which the ESEA requires, the only important question which remains is one of state constitutional law: Can the enabling act be validly implemented to the extent that it deals with the funds themselves? If, as has been asserted, Title I allocations are impressed with a federal trust, the supremacy clause operates to render state law irrelevant and the enabling statute, insofar as it deals with the purposes for which the funds are expended, merely restates what would be the law in its absence. Thus, although a state court could purport to declare the ESEA violative of the state's constitutional provisions, such a declaration could not be a proper basis for prohibiting the state officials from utilizing the funds in accordance with the requirements of the ESEA.

The second group of states in which the attorneys general have invoked the trust-fund theory to immunize Title I funds from state constitutional provisions prohibiting the use of state funds for a religious institution consists of states which do not have specific enabling acts.[51] The opinions of these attorneys general reason that since such funds are impressed with a trust, they must be used in strict accordance with the federal guidelines, state constitutional restrictions notwithstanding.[52] Such a position appears to be an implicit recognition that an enabling statute is superfluous insofar as it purports to authorize the disbursement of funds in a manner consistent with the policy evidenced by the federal law. Thus, the trust-fund theory together with or absent an enabling act renders state substantive law irrelevant in determining the permissible uses of Title I funds.

Notwithstanding the persuasiveness of the trust-fund concept, several states have taken the position that state constitutional provisions prohibiting aid to religious institutions are relevant in determining the purposes for which Title I funds can be spent. This view is based upon the idea that once grants have been transmitted from the Office of Education they become state funds and are thus within the purview of the state constitution.[53] With one exception,[54] the

law, whether such funds come directly or indirectly from the United States or any agency or department thereof or through the state of Ohio or any agency, department or political subdivision thereof.

OHIO REV. CODE ANN. § 3317.06 (Page Supp. 1966).

51. See, *e.g.*, OP. GA. ATT'Y GEN., July 7, 1965; OP. IOWA ATT'Y GEN., April 14, 1966; OP. NEV. ATT'Y GEN., Nov. 5, 1965; OP. N.Y. ATT'Y GEN., July 15, 1965; OP. P.R. ATT'Y GEN., May 20, 1966.

52. See, *e.g.*, OP. IOWA ATT'Y GEN., April 14, 1966, p. 7.

53. See, *e.g.*, OP. OKLA. ATT'Y GEN. No. 65-302, Sept. 16, 1965, p. 8:

We see no essential difference in whether or not federal grant funds only are used in approved programs or federal grant funds and local school district funds are used; both are public money or property within the prohibition contained in Article II, Section 5, Okla. Constitution.

See also OP. S.D. ATT'Y GEN., March 10, 1966.

54. The opinion of the Oklahoma Attorney General does not mention any state

attorney general opinions espousing this conclusion rely upon state statutes which require funds received from the federal government for educational purposes to be placed in the state treasury or in a school fund.[55] Since these funds are thus commingled with state funds, it can be argued that they too become state funds subject to applicable state constitutional restrictions.[56] Admittedly, it has been suggested that the segregation of funds is crucial to the applicability of the trust-fund theory.[57] However, although there was some indication that ESEA funds would be commingled with state funds,[58] it is doubtful that such commingling occurs in actual practice.[59] Furthermore, even if Title I funds are commingled, it does not necessarily follow that they lose the trust which was impressed upon them by virtue of their being federal grants upon conditions. Therefore, once again invoking the supremacy clause, such funds would be controlled by the paramount federal interest, and state law would necessarily be viewed as irrelevant.

B. *Administrative Officials as a Possible Object of State Constitutional Concern*

Little consideration has been given in the various attorney general opinions to the possible relevance of state law to the activities

statutes which require federal funds to be placed in the state treasury. OP. OKLA. ATT'Y GEN. No. 65-302, Sept. 16, 1965, p. 8.

55. See OP. NEB. ATT'Y GEN. No. 123, Oct. 27, 1965, p. 2; OP. WIS. ATT'Y GEN., July 19, 1966, p. 4, citing WIS. STAT. § 20.550(68) (1966), which states:

> Any and all funds which may be paid to this state under the authority of s. 16.54 shall, upon receipt, be paid into the state treasury, and the same shall be and are appropriated to the state board, commission or department designated by the governor to administer the same. Expenditures of such funds shall be made in the same manner and subject to the laws, rules and regulations governing payments made by the state treasury, and further such expenditures shall be made in accord with federal rules and regulations.

This statute seems to be internally inconsistent since it states that, although federal funds must be spent in accordance with state rules, they must also be expended in accordance with federal rules. It is possible, however, that due to the omission of the word "law" in the latter part of the sentence, the statute merely requires expenditures according to federal procedures.

56. See, *e.g.*, OP. WIS. ATT'Y GEN., July 19, 1966, p. 10.

57. See OP. KY. ATT'Y GEN. No. 65-865, Dec. 17, 1965, p. 5; OP. N.Y. ATT'Y GEN., July 15, 1965.

58. 111 CONG. REC. 7309 (1965) (remarks of Mr. Morse).

59. The process by which Title I funds reach the creditors of the local school district is described in OP. ORE. ATT'Y GEN. No. 6162, July 29, 1966, pp. 9-10. It appears that after the Office of Education makes an allotment to a state, a "letter of credit" is issued to the state educational agency. This letter allows a maximum amount to be drawn from the regional federal reserve bank and sent to the bank in which general state money is deposited, and there it is placed in a special federal funds account in the name of the State Treasurer. The Treasurer notifies the state educational agency of the availability of the funds, and the agency in turn issues vouchers to the Secretary of State authorizing payment of the local agency's creditors. See generally U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, GUIDELINES: SPECIAL PROGRAMS FOR EDUCATIONALLY DEPRIVED CHILDREN 5-8 (1966).

of the state officials who administer Title I programs. In the few opinions in which the issue has been raised, it has been disposed of by characterizing such officials as mere instrumentalities or custodians of the federal funds, thereby bringing them within the scope of the trust-fund theory. It is thus argued that, in the exercise of their fiduciary duty, they are governed by the same federal law which controls the disposition of the Title I funds, and since the federal law is supreme, state constitutional restrictions would be irrelevant.[60] However, as noted above,[61] although federal funds would appear to be justifiably excluded from the reach of state law, such an approach cannot logically be utilized with respect to persons who are at all times state officials. Unfortunately, the proponents of the custodian theory fail to specify their reasons for excluding these officials from the application of state law. At the very least, the state has an economic interest in the man-hours expended by the Superintendent of Public Instruction and his staff in constructing and implementing the Title I program. Moreover, the analysis which was employed to refute the idea that the federal funds became state funds merely because they have been transmitted to the state[62] would, in this instance, support the conclusion that state officials retain their identity as state officials regardless of their involvement in the administration of a federal program. Thus, although the state officials may be labeled custodians or conduits, they would still appear to be subject to the restrictions of the state constitution.

The Oregon Attorney General, admitting that participation in Title I programs seems to violate the spirit of the Oregon Constitution, nonetheless has concluded that, absent specific state constitutional restrictions, the presumed validity of the state enabling statute authorizing administration of Title I programs by state personnel must be given controlling weight.[63] In effect, therefore, his position is that a state statute which permits certain conduct by state administrators can by itself render the state constitution inoperative as to the conduct of such officials. The difficulty with this view, however, is that it begs the question of whether the enabling act itself is unconstitutional. The enabling act is presumed constitutional because, absent specific constitutional restrictions on the conduct authorized by the act, the act will prevail. However, under such an interpretation, an enabling statute of this type could never be declared unconstitutional and, therefore, ultimate policy would be governed, not by the state constitution, but rather by the invulnerable enabling act.

60. See, *e.g.*, OP. IOWA ATT'Y GEN., April 14, 1966, p. 7.
61. See text accompanying notes 50-52 *supra*.
62. *Ibid.*
63. See OP. ORE. ATT'Y GEN. No. 6162, July 29, 1966, p. 16.

A fact which partially answers the idea that state substantive law might be applicable to the administration of Title I programs and with which the Oregon Attorney General could have avoided the circularity of his approach is that the ESEA authorizes federal financing of the administrative expenses incurred in implementing the state plan.[64] It could be argued that, by virtue of this federal remuneration, the state personnel involved in administering the programs become federal officials *pro tanto*.[65] Therefore, either because the state's interest in the conduct of these officials is lacking or because the supremacy clause relegates state law to a subservient position, the state cannot presume to regulate any aspect of a Title I program. This analysis would seem to be especially appropriate in states whose constitutional provisions with respect to the establishment of religion are phrased in terms of prohibiting the withdrawal of public funds for the support of religious institutions.[66] In these states, it might be argued that the state's only concern is with the expenditure of state monies and since, as noted above, money is not being drawn from its treasury, this limited state constitutional provision is not a relevant consideration. On the other hand, in those states whose constitutional prohibitions are based not on the withdrawal of funds but rather, for example, on the use of any public money,[67] the federal supremacy clause would once again be appropriate support for the conclusion that federal law controls.

It is submitted, however, that there are at least two areas in which state officials are still subject to or controlled by state substantive law. The first is administrative conduct that in no way impinges upon the purposes for which Title I funds are given to the state. For example, a state penal statute prohibiting members of local boards of education from acquiring a pecuniary benefit as a result of contracts with the educational agency is a proper point of reference

64. The ESEA authorizes payment of administrative expenses to the extent of 1% of the total amount of the basic grant. E.S.E.A. § 207(b), 79 Stat. 32 (1965), as amended, 20 U.S.C. § 241g(b) (Supp. 1965), as amended, 20 U.S.C.A. § 241g (Supp. 1967).

65. The *pro tanto* issue was apparently considered sufficiently important to prompt the Kentucky Department of Public Instruction to inquire whether teachers paid by Title I funds would be subject to state certification requirements and eligible for state tenure and pension benefits. OP. KY. ATT'Y GEN. No. 66-139, March 4, 1966, answered both questions in the affirmative.

66. See OP. GA. ATT'Y GEN., July 7, 1965, p. 2. The Georgia Constitution is phrased in such terms. GA. CONST. art. I, § I, ¶ XIV. Consequently, the Georgia Attorney General ruled that Title II could be implemented because administrative as well as operational expenses would be defrayed from federal funds. *Cf.* OP. ARIZ. ATT'Y GEN., Oct. 4, 1965; OP. N.Y. ATT'Y GEN., July 15, 1965.

Moreover, Georgia appears to be the only state which, by constitutional amendment, has made possible the use of state matching funds in federally financed programs. See GA. CONST. art. VII, § I, ¶ II(7), which gives the state government and its departments and agencies authority to disburse state funds to match federal funds for certain specified scholarships "and for use in other Federal education programs."

67. See, *e.g.*, COLO. CONST. art. IX, § 7; N.Y. CONST. art. XI, § 3.

for examining the behavior of state personnel distributing ESEA funds.[68] Since there is no federal law in this area, the supremacy clause is inapplicable. Moreover, since the expressed federal purpose for which the trust funds were granted is neither advanced nor impeded by violations of such statutes, it would seemingly be appropriate to adhere to the state law and thereby further the legitimate state interest of regulating the affairs of its employees. However, if the federal government were to enact legislation with respect to this question, clearly federal law would control to the exclusion of state regulation.[69]

Second, state substantive law also controls the conduct of state officials *qua* state officials. Admittedly, certain persons, such as teachers, may become federal employees *pro tanto* because they receive payments from Title I funds, but some officials who are intimately involved in the implementing of Title I programs, such as the Superintendent and his staff, perform at least several functions in their capacity as state representatives—namely, the applying for and receiving of Title I funds and the submission of the requisite assurances to the Office of Education.[70] Since theoretically the federal government does not have an interest in whether a state decides to accept a grant-in-aid, the policy determination to apply for such funds is made by the Superintendent in his capacity as spokesman for the state, and consequently his conduct with respect to these matters would be regulated by state law.

The opinion of the South Dakota Attorney General is one of the few that specifically considers the effect of the state constitution on the conduct of public officials.[71] The attorney general concluded that the implementation of shared services programs would violate a constitutional provision which forbids "the state or any county or municipality within the state [to] accept any grant . . . to be used for sectarian purposes . . . ."[72] Consequently, he advised that Title I programs could be established as long as shared services projects were excluded from the proposed programs. Implicit in his opinion is a rejection of the trust-fund theory, for had the theory been accepted, he would not have been able to advise state officials to refrain from implementing shared services projects since to so advise would be

68. OP. W. VA. ATT'Y GEN., July 22, 1966.

69. The Iowa Attorney General has expressed the opinion that a misappropriation of Title I funds would be a federal crime. See OP. IOWA ATT'Y GEN., April 14, 1966, p. 7, basing his opinion on United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943).

70. See E.S.E.A. § 206, 79 Stat. 31 (1965), as amended, 20 U.S.C. § 241f (Supp. 1965), as amended, 20 U.S.C.A. § 241f (Supp. 1967).

71. OP. S.D. ATT'Y GEN., March 10, 1966; *cf.* OP. KY. ATT'Y GEN. No. 65-865, Dec. 17, 1965, p. 8, for what appears to be a discussion of the possible effect of state law on the conduct of state educational officials.

72. OP. S.D. ATT'Y GEN., March 10, 1966, p. 6. The relevant provision is found in S.D. CONST. art. VIII, § 16.

to encourage their violating the conditions of the trust. Moreover, if the trust-fund theory were accepted, it would have been necessary to face the crucial question of whether the constitution would be violated by the acceptance of such conditioned funds, and the only result possible, given the explicit language of the constitution, would be the elimination of Title I programs in South Dakota for both public and non-public schoolchildren.

It is submitted that in deciding whether a state should undertake a Title I program, it would be proper to determine initially whether the various types of projects authorized by the federal act, including shared time and shared services, can constitutionally be implemented by the state and its officials. Obviously, unless this question can be answered in the affirmative, the requisite assurances cannot be given to the Office of Education. Apart from South Dakota and Nebraska, which have specific restrictions on the acceptance of such grants,[73] there are apparently four general types of constitutional provisions which could be interpreted as being relevant to the conduct of state administrative officials. First, the most common constitutional provision forbids the withdrawal of money from the state treasury in aid of sectarian institutions.[74] It might be argued that the payment of the salary or expenses of any person involved in administering the Title I program constitutes such a withdrawal and is, therefore, unconstitutional. Second, several constitutions prohibit the *use* of any public money *whatever* for sectarian purposes.[75] Although the trust-fund theory would render such a provision irrelevant as to the purposes for which the money is spent, it might be argued that Title I funds are "public money whatever," and that therefore the constitution prohibits the act of *using* such money by state officials for sectarian purposes. Third, absent an express or implied limitation on the conduct of state personnel, some state constitutions could nonetheless be interpreted as containing a "policy" restricting official conduct with respect to church-state matters.[76] Finally, there are a few states with provisions *sui generis*, such as Maryland[77] and South Carolina,[78] which may be relevant to the actions of state officials.

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73. NEB. CONST. art. VII, § 11; S.D. CONST. art. VIII, § 16.

74. See, *e.g.*, ALASKA CONST. art. VIII, § 1; GA. CONST. art. I, § 1; MICH. CONST. art. I, § 4; TEX. CONST. art. I, § 7.

75. See, *e.g.*, COLO. CONST. art. IX, § 7; N.Y. CONST. art. XI, § 3.

76. The Oregon Attorney General expressed the opinion that certain aspects of the ESEA might violate the "policy" of the Oregon Constitution. OP. ORE. ATT'Y GEN. No. 6162, July 29, 1966, pp. 11, 16. See also OP. NEB. ATT'Y GEN. No. 123, Oct. 27, 1965, p. 3.

77. MD. CONST. art. 38, states in part "That every gift . . . to, or for the support, use or benefit of, or in trust for . . . any Religious Sect, Order or Denomination . . . without the prior or subsequent sanction of the Legislature, shall be void . . . ."

78. S.C. CONST. art. XI, § 9:

> [A]ny public money, from whatever source derived, shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any . . . institution . . . of whatever kind, which is wholly or

II. Acceptance of the Trust-Fund Theory

A. *Effect on the Availability of Remedies*

The initial hurdle for a federal taxpayer challenging the constitutionality of the ESEA is one of standing. Although the *Frothingham*[79] doctrine probably eliminates the possibility of bringing such a suit in a federal court under the federal constitution, there apparently is not a similar restriction when the claim is brought in a state court and is based upon state law.[80] Thus, the

in part under the direction or control of any church or of any religious or sectarian denomination, society or organization.

79. Frothingham v. Mellon, 262 U.S. 447, 487-88 (1923):

> But the relation of a taxpayer of the United States to the Federal Government is very different [from that existing between a stockholder and a corporation]. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect on future taxation, of payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity . . . .
>
> . . . We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. . . . The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

On the standing question under the Federal Constitution, see Drinan, *Standing To Sue in Establishment Cases*, in 1965 Religion and the Public Order 161 (1966); Brown, *Quis Custodiet Ipsos Custodes?—The School Prayer Cases*, 1963 Sup. Ct. Rev. 1, 15-33; Pfeffer, *Public Aid to Parochial Schools and Standing To Bring Suit*, 12 Buffalo L. Rev. 35 (1963); Sutherland, *Establishment According to Engel*, 76 Harv. L. Rev. 25 (1962).

There was an unsuccessful attempt in the 89th Congress to enact a standing provision authorizing taxpayers suits. See S. 2097, 89th Cong., 1st Sess. (1965); *Hearings on S. 2097 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess. (1966); Sky, *The Establishment Clause, The Congress and the Schools: An Historical Perspective*, 52 Va. L. Rev. 1395, 1442-43 (1966). Title I does, however, confer standing on the state agency to challenge a wrongful refusal by the Office of Education to give funds to the aggrieved agency, E.S.E.A. § 211, 79 Stat. 33 (1965), 20 U.S.C. § 241k (Supp. 1965), as amended, 20 U.S.C.A. § 241k (Supp. 1967). Moreover, if a local educational agency were to refuse to provide for non-public schoolchildren, it is likely that an aggrieved child would have standing to challenge such refusal on the basis of the equal protection clause. *Cf.* McNeese v. Board of Educ., 373 U.S. 668 (1963).

80. The three factors relevant to the standing issue—the action questioned, the constitution interpreted and the forum—lend themselves to the following eight permutations:

Action Questioned	Constitution Interpreted	Forum
(1) Federal (Title I)	Federal	Federal
(2) Federal "	Federal	State
(3) Federal "	State	Federal
(4) Federal "	State	State
(5) State (State officials)	Federal	Federal
(6) State "	Federal	State
(7) State "	State	Federal
(8) State "	State	State

state court can legitimately be asked to determine the type of relief which should be granted when an individual establishes that he has been aggrieved by a violation of the state constitution. If the trust-

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Assuming a suit by a taxpayer only as such, and not, for example, as a person alleging a violation of a free exercise guarantee or as a parent of a schoolchild, the following would appear to be the probable disposition of each situation on the standing issue:

(1) If this suit were originally brought in a federal court, it would seem to be a classic case for the application of the *Frothingham* doctrine, subject to any erosion of the no-standing principle resulting from the later cases. See note 79 *supra*. The difficult question arises where this suit was initiated as permutation (2) and later comes to the Supreme Court on *certiorari*. The Court would appear to have three alternatives. First, it could deny *certiorari* on the ground that plaintiff's lack of standing precludes a federal court from taking cognizance of the action. Second, the Court might grant *certiorari* and dismiss the complaint because of lack of standing. Third, *certiorari* could be granted and the merits considered on the ground that the state court's determination of standing is binding. *Cf.* Doremus v. Board of Educ., 342 U.S. 429, 434 (1952) (emphasis added):

> We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of "case or controversy," we cannot accept *as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review*, any procedure which does not constitute such.

In *Doremus*, the appeal from the Supreme Court of New Jersey was dismissed. See also Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031, 1057 (1963). As a hedge against application of *Frothingham* to Flast v. Gardner, Civil No. 4102/1966 (S.D.N.Y., filed Dec. 1, 1966), a suit of the permutation (1) variety, the American Jewish Congress, through its special counsel, Mr. Leo Pfeffer, instituted a permutation (2) suit, Polier v. Board of Educ., Civil No. 19540/1966 (Sup. Ct. N.Y. County, filed Dec. 1, 1966). See American Jewish Cong., News Release, Dec. 1, 1966.

(2) It is unclear what the state court would do with the standing issue in this suit. If *Frothingham* is deemed controlling, it would appear that the state court would be free to determine the issue as a matter of state law. The extract from *Frothingham* set out in note 79 *supra* appears to assign two distinct bases for the standing restriction: the remoteness of the injury precludes the invocation of the powers of the federal equity court; and the "case or controversy" requirement of the federal constitution forbids consideration of a complaint where the injury is not direct. Neither of these two bases would bind the state court, although the first could be determinative if invoked as state law. See Doremus v. Board of Education, *supra*. On the other hand, if the state court were to view the standing requirement as attaching to the federal statute, the question could be resolved as a matter of federal law.

(3) The trust-fund theory would render this action impossible.

(4) Same as (3).

(5) If this suit were initially instituted in the federal court, the disposition of the standing issue would probably depend upon a factual investigation of state fiscal administration. If this investigation reveals that the injury was direct, as in Everson v. Board of Educ., 330 U.S. 1 (1947), the federal court could decide the case on the merits. If, on the other hand, the injury were deemed indirect, the cause would not be justifiable. See Doremus v. Board of Educ., *supra* at 434; McCollum v. Board of Educ., 333 U.S. 203, 233 (1948) (Jackson, J., concurring). Were this suit to reach the Supreme Court on appeal or *certiorari* as permutation (6), the above reasoning would appear to be equally applicable.

(6) The suit would seem to be completely controlled by state standing requirements and therefore its disposition will be the same as that in permutation (8).

(7) This suit is impossible to bring for lack of a federal question.

(8) This suit would be governed *in toto* by state law and, because of the absence of a federal question, could not reach the federal courts. The majority of states appear to allow taxpayer suits which challenge the validity of state action under the state constitution. See, *e.g.*, Graham v. Jones, 198 La. 507, 3 So. 2d 761 (1941); Horace Mann League

fund theory is accepted by the courts, it is submitted that a finding of invalidity under the state constitution will, in effect, preclude all schoolchildren in the state from receiving Title I benefits.

Assuming that the complainants allege a violation of the state constitution, consider the following three procedural settings in which such a suit could arise. First, the complainants may seek to enjoin state officials from participating in *all* Title I projects and returning the federal grants to the Office of Education.[81] Since the trust-fund theory renders state law irrelevant in determining the permissible uses of federal funds, the state court would not have any basis for issuing a decree which would operate against the funds themselves. However, since the trust-fund theory will not immunize state officials from the restrictions of the state constitution, the courts can justifiably enjoin the state officials from participating in Title I programs. Thus, the result of such a suit would be to discontinue within the state the Title I program in its entirety.

A second possible setting would be one in which the complainants pray for an injunction against state officials participating in only those Title I projects which violate the state constitution. Since state restrictions are concerned only with aid to sectarian institutions, it might be expected that this would be the typical approach. Accordingly, two of the complaints challenging Title I to date have asked only that state and federal officials be enjoined from extending certain types of aid to non-public schoolchildren;[82] no attempt was made to restrict aid to public schoolchildren.[83] The likely defense to these suits would be to invoke the trust-fund theory, which, if accepted, would lead to the same result as in the first example: the state officials involved in implementing Title I programs could not be forced to violate the assurances given pursuant to the ESEA, so that they would have to discontinue such programs in their entirety.

A third possibility is presented if a state court were unwilling to entertain a defense based upon the trust-fund theory and subsequently granted an injunction against the implementation of those, but only those, Title I projects that benefit non-public schoolchildren. Such schoolchildren might then sue in a federal court for

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of the United States v. Board of Public Works, 242 Md. 645, 220 A.2d 51, *cert. denied*, 385 U.S. 97 (1966); Berghorn v. Reorganized School Dist. No. 8, 364 Mo. 121, 260 S.W.2d 573 (1953); Conway v. New Hampshire Water Resources Bd., 89 N.H. 346, 199 Atl. 83 (1938); Herr v. Rudolph, 75 N.D. 91, 25 N.W.2d 916 (1947). *But see* Nichols v. Williams, 338 Mich. 617, 62 N.W.2d 103 (1954).

81. This is the form of relief requested in Protestants and Other Americans United for the Separation of Church and State v. United States, Civil No. 3303 (S.D. Ohio, motion to dismiss filed Aug. 16, 1966), a suit challenging the constitutionality of Title II of the ESEA under the first amendment.

82. See Flast v. Gardner, Civil No. 4102/1966 (S.D.N.Y., filed Dec. 1, 1966); Polier v. Board of Educ., Civil No. 19540/1966 (Sup. Ct. N.Y. County, filed Dec. 1, 1966).

83. See N.Y. Times, Dec. 2, 1966, p. 28, col. 4 (city ed.).

a mandatory injunction requiring state officials to comply with the express terms of the ESEA.[84] Assuming that the federal court would accept the trust-fund theory, an order could be issued requiring the state officials to comply with the assurances initially furnished to the Office of Education or to discontinue the entire Title I program. The state officials would thus be faced with both a state and a federal court injunction, and again the dilemma could be resolved only by discontinuing all state participation in Title I benefits. The officials might attempt to raise illegality under state law as a defense to the federal injunction. However, pursuant to classic trust law, the use of illegality as a defense to carrying out the terms of a trust results in a decree that the corpus of the trust be returned to the settlor under the theory of a resulting trust.[85] Therefore, in all three procedural settings, the finding of the invalidity of Title I programs under state law leads to the drastic result of depriving the state of any participation in the federal program.

B. *Effect on Administrative Practice*

The trust-fund theory could conceivably have an impact in two areas apart from the remedy question. If a state educational agency were aware of the probability that shared time or shared services projects would be deemed violative of the state constitution, it might attempt to avoid the possibility of having to discontinue all Title I programs by refusing to implement any potentially offensive projects. Such a decision would, of course, have to be executed discreetly so as to avoid any suggestion that the assurances given to the Office of Education were being violated. However, because such a tactic would probably result in a political uproar, the exclusion of nonpublic schoolchildren from Title I benefits does not appear to be a feasible alternative. The agency might avoid this problem by declaring the potentially offensive project unsound as a matter of educational policy, and for that reason refuse to approve it. However, realistically, it is extremely unlikely that state educational officials would try to evade their responsibility in this manner.[86] More-

84. The American Jewish Congress has suggested that the Roman Catholic Church will actively oppose any action brought to declare the ESEA unconstitutional in order to protect the parochial school interests. See American Jewish Congress, Background Memorandum on Church-School Lawsuits, Dec. 1, 1966, p. 5.

85. 4 SCOTT, TRUSTS § 442 (1956).

86. According to the National Catholic Welfare Conference, all states except Oklahoma, Missouri and Nebraska are implementing Title I at present. Letter From George E. Reed to the *Michigan Law Review*, Nov. 17, 1966. However, it appears that those three states have some type of Title I program. Oklahoma has established Title I programs in her public schools and permits parochial pupils to attend. Letter From Oliver Hodge, the Oklahoma Superintendent of Public Instruction, to the *Michigan Law Review*, Sept. 21, 1966. Missouri appears to permit parochial school students to receive instruction after school hours. Letter From Delmar A. Cobble, Missouri Deputy Commissioner of Education, to the *Michigan Law Review*, Oct. 4, 1966. Missouri law allows

over, since the ESEA provisions call for an extensive evaluation of the state Title I programs by the Office of Education,[87] such a procedure could not be carried on without at least the tacit approval of the federal administrators, and the limited amount of available evidence suggests that the Office of Education favors maximum participation of non-public schoolchildren in Title I projects.[88] Indeed, the Office of Education appears to evaluate and recommend projects solely on the basis of their cost and the likelihood of their success, even where a particular project might appear to be more constitutionally objectionable than a possible substitute.[89]

C. *Effect on State Constitutional Law*

The possibility that a finding of invalidity of a particular Title I project will force a discontinuance of the entire state Title I program may influence the state courts in their determination of the constitutional question. Although the precise nature of the question will obviously vary depending upon the particular project involved, and the almost complete lack of litigation in the area leaves much to speculation, several possible objections to Title I have been suggested and should be considered. Since a shared services program not only provokes the same objections as shared time but also raises questions peculiar to itself, the following discussion will be focused primarily on such programs.

The first suggestion of unconstitutionality, which applies to both shared time and shared services, is that the benefits of Title I flow primarily to the institution and not to the children involved.[90] The

neither shared time during school hours nor shared services. See Special Dist. v. Wheeler, 408 S.W.2d 60 (Mo. 1966). Nebraska apparently has implemented some projects including parochial school students. Letter From Floyd A. Miller, Nebraska Commissioner of Education, to the *Michigan Law Review*, Sept. 21, 1966.

87. E.S.E.A. § 206, 79 Stat. 31 (1965), as amended, 20 U.S.C. § 241f (Supp. 1965), as amended, 20 U.S.C.A. § 241f (Supp. 1967). See generally U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, GUIDELINES: SPECIAL PROGRAMS FOR EDUCATIONALLY DEPRIVED CHILDREN 1, 34-40 (1965).

88. See NATIONAL ADVISORY COUNCIL ON THE EDUCATION OF DISADVANTAGED CHILDREN, FIRST ANNUAL REPORT (1966), reproduced in H.R. REP. No. 1814 (pt. 2), 89th Cong., 2d Sess. 11-23 (1966).

89. One impressive example of this fact is the New Jersey Title I program which is based primarily on shared services rather than shared time. See Letter From Dr. William W. Ramsay, ESEA Co-ordinator for the New Jersey Department of Education, to Mr. Joseph Hoffman, April 14, 1966 (on file with the *Michigan Law Review*). An Office of Education evaluation of the New Jersey program found that it was a model both in quality and quantity of approved projects. *Ibid.*

90. The legislative history of the ESEA indicates that the child-benefit theory was intended to furnish the basis for combatting an objection under the establishment clause. See Kelley & Lanoue, *The Church-State Settlement in the Federal Aid to Education Act*, in 1965 RELIGION AND THE PUBLIC ORDER 110, 112-13 (1966). The theory's opponents counter by stating that the supposed distinction between aiding children and aiding institutions is fictitious. *Ibid.* See generally Opinion of the Justices, 216 A.2d 668 (Del. 1966), for a discussion of these arguments.

resolution of this issue depends upon the state court's acceptance or rejection of the child-benefit or related theories.[91] The drastic effect of a finding of state constitutional invalidity may compel a court which might otherwise not do so to accept one of these theories so as to avoid a finding of invalidity.

A second objection, probably peculiar to the shared services programs, is that while the particular project may have an admittedly secular purpose, the means by which that purpose is effectuated are essentially religious in nature.[92] The argument apparently posits that since a public means—the public school—is available through the use of shared time programs, the use of public teachers in the parochial school building pursuant to a shared services program is an unnecessary religious means to the secular end of aiding all educationally deprived schoolchildren. However, the force of the religious-means argument will depend upon two factors. First, since the means test originated as a corollary to the first amendment, there may be no basis in state law for applying such a test unless the state's constitution has been interpreted as conforming to the federal constitution.[93] Second, as a substantive matter, it might be argued that although the shared services method is in a sense more "religious" than shared time, policy considerations of convenience and cost militate in favor of the use of the former in certain cases.[94] Since a tribunal faced with this question as a matter of first impression will thus have to weigh the various policy and political considerations, it is not unlikely that it will also take into account the fact that to find an individual type of project unconstitutional will deprive all of the schoolchildren in the state of Title I benefits.[95]

Conclusion

Although the possibility of non-participation in Title I may lead certain states to re-examine their substantive law,[96] it is nevertheless

91. A significant split has developed over the child-benefit theory in the context of bus and textbook statutes. See ANTIEAU, CARROLL & BURKE, RELIGION UNDER THE STATE CONSTITUTIONS 23-50 (1965), for material indicating the position taken by various states.

92. See Flast v. Gardner, Civil No. 4102/1966 (S.D.N.Y., filed Dec. 1, 1966); Polier v. Board of Educ., Civil No. 19540/1966 (Sup. Ct. N.Y. County, filed Dec. 1, 1966). Such an objection is apparently based on School Dist. v. Schempp, 374 U.S. 203, 223-24 (1963), where the Court suggested that while a particular law might have a primarily secular effect, the use of religious means to implement the intended secular goal would violate the first amendment.

93. See note 32 *supra*.

94. This appears to be the primary reason for the extensive use of shared services projects in New Jersey. See Letter From Dr. William Ramsay to Mr. Joseph Hoffman, April 14, 1966 (on file with the *Michigan Law Review*).

95. Apart from the two basic objections discussed above, the shared services concept appears to be vulnerable to the objection that public school teachers who are compelled to perform their services in church-related schools are thereby denied the free exercise of their religion. See Complaint, ¶ 32, Polier v. Board of Educ., Civil No. 19540/1966 (Sup. Ct. N.Y. County, filed Dec. 1, 1966).

96. Although no widespread movement in this direction is expected, New York will have a constitutional convention commencing in the spring of 1967, one purpose of

likely that some courts will decide that Title I cannot legally be implemented in their states. To the extent that educationally deprived children are excluded from Title I benefits, the goals of the poverty program in general and the ESEA in particular will be frustrated. It is also conceivable that a considerable amount of political ill-will may be produced by the fact that children in some states are benefited by federal programs while those in others are not. If these problems are to be alleviated, the burden rests with the federal government. One possible solution is that, with respect to those states which cannot constitutionally participate, the administration of Title I could be transferred from state to federal agencies, thereby completely nullifying the effect of state law.[97] Indeed, such an approach has been used in at least one state to implement Title II of the ESEA.[98] Unfortunately, however, the varieties of service projects constituting a Title I program renders it administratively unfeasible for the federal government to replace the state agencies. Thus, if, in a given state, Title I is rendered ineffective to any significant degree, in the future its program might well be supplanted by a direct aid scheme which is more easily administered at the federal level, such as, for example, tax credits for non-public school tuition payments[99] or direct grants to needy children or institutions.[100] Such direct aid would promote the goal of better education for all while avoiding altogether the effects of state constitutional law.

Jon Feikens

which is to reconsider the state's "Blaine" provision with a view to replacing it with a provision similar to that in the federal Constitution. See Cusack, *The New York State Constitutional Convention—A Preview*, in PROCEEDINGS OF THE NATIONAL MEETING OF DIOCESAN ATTORNEYS 19 (1966). See generally Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951); Rice, *The New York State Constitution and Aid to Church-Related Schools*, 12 CATHOLIC LAW. 272 (1966).

97. See OP. S.D. ATT'Y GEN., March 10, 1966, p. 6.

98. Because the Oklahoma Attorney General has ruled that Title II benefits may not be extended to non-public schoolchildren, Oklahoma has refused to implement a Title II program through its state agencies. Therefore, the Office of Education is administering such aid through non-state agencies. Letter From Oliver Hodge, the Oklahoma Superintendent of Public Instruction, to *Michigan Law Review*, Sept. 21, 1966.

99. For a discussion of the so-called Ribicoff proposal, see Note, *Church-State—Religious Institutions and Values: A Legal Survey—1964-66*, 41 NOTRE DAME LAW. 681, 717 (1966).

100. Direct grants to parochial schools are, however, extremely unlikely due to the obvious constitutional problems involved. For a discussion of this type of plan as well as of other programs of dubious validity, see U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, MEMORANDUM ON THE IMPACT OF THE FIRST AMENDMENT TO THE CONSTITUTION UPON FEDERAL AID TO EDUCATION, in S. DOC. No. 29, 87th Cong., 1st Sess. 5-6 (1961). The HEW memorandum and a reply memorandum prepared by the National Catholic Welfare Conference are reprinted in 50 GEO. L.J. 351 (1961).